PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ATTORNEY AND CLIENT.

Amount of Attorney's Fees, Determined by the Court

The following statement from the syllabus of an opinion of the Supreme Court of Louisiana is of much wider operation than the provisions of a civil code: "Jurisprudence has settled the rule, and consecrated it, that the quantum of attorney's fees in any case where the services have been performed in the presence of the court which is called upon to decide the question is a matter of law rather than one of fact, and that it will value the same as its opinion, and sound discretion dictate rather than base its judgment upon the opinion of witnesses." *Succession of Rabasee*, 25 So. 326.

Notice, in connection with this, Judge Sharswood's opinion in *Daly* v. *Maitland*, 88 Pa. 384 (affirmed *Lindley* v. *Ross*, 137 Pa. 633), to the effect that an even stipulation for an attorney's commission, inserted in a mortgage, is rather in the nature of a penalty than of liquidated damages, and is subject to the control and discretion of the court—not of the jury.

BANKRUPTCY.

Effect on State Insolvent Laws

Although, of course, superseding state insolvent laws proper, it is pretty well settled that a national bankrupt law does not affect an ordinary assignment for the benefit of creditors: *Boese* v. *King*, 108 U. S. 379. This was followed in *State* v. *Superior Court of King County*, 56 Pac. (Wash.) 35, where it was held that, no bankruptcy proceedings having been instituted, the power of the State Court to appoint a receiver to wind up the affairs of an insolvent corporation was undoubted.

Examination

In re Price, 91 Fed. 635, decides that, under § 7 (9) of the bankrupt law, the right to examine the bankrupt is not limited to any particular time, and hence the creditors were allowed to do so in order to ascertain whether there was any ground to oppose his discharge. *Quære*, whether decision would be the same if the bankrupt had already been examined.

BANKRUPTCY (Continued).

Mitchell v. *McClure*, 91 Fed. 621, is the first decision on what is likely to be a much disputed question, viz., How far have the United States Courts jurisdiction under the new law of suits by receivers or trustees? This was a replevin by a receiver in the District Court to recover personal property. All parties were residents of Pennsylvania. Motion to abate the writ was granted by Buffington, D. J., on the ground that under § 23 (b) the suit should have been in the Common Pleas Court. The judge relied on *Morgan* v. *Thoushill*, 11 Wall. 75; *Smith* v. *Mason*, 14 Wall. 430, and *Maisbell* v. *Knox*, 16 Wall. 556; and, intimating a doubt whether any section of the present act confers jurisdiction of plenary suits upon the District Court, held that, even if the court had such jurisdiction, it was limited by § 23 (b), by the right of the defendant to remove to State Court.

Jurisdiction of District Court

BANKS AND BANKING.

Ordinarily a deposit in a bank makes the money deposited the property of the bank, which becomes the debtor of its depositor. Not so when the depositor is a state official, who, as the bank is bound to know, has no authority to make the deposit. Although entered generally, the deposit in law is then a special one, which can be followed into the hands of the bank's receiver: *State* v. *Thum*, 55 Pac. (Idaho) 858.

Deposit in Bank, Public Money

CONTRACTS.

M entered into a contract with the Eastern Advertising Company, whereby the company agreed to display advertising cards of M in certain street cars for one year, the cards to be "subject to approval of the Eastern Advertising Company as to style and contents." Held, that this was a contract where skill and judgment as well as taste were required to be exercised by the advertising company, both in the designing of the cards and in selecting the type in which they were to be printed, and in the arrangement of the cards in the cars, and was, therefore, not assignable by the company: *Eastern Advertising Co.* v. *McGaw* (Court of Appeals of Maryland), 42 Atl. 923.

Assignment

A sold land to B, representing to B that he (A) had paid a certain price for it. This statement was untrue. No confidential relations existed between A and B, but they had been acquainted with each other for several years. In an action by A against B to recover the pur-

Misrepresentation, Acquaintance

CONTRACTS (Continued).

chase price, B testified that A took advantage of their acquaintance and friendly relations to accomplish the sale. Held, that a direction to the jury to find for the plaintiff was error: *Dorr* v. *Cory* (Supreme Court of Iowa), 78 N.W. 682.

Construction, Wages

A, a workman, was injured in the service of B, and, in compromise of his claim against B for damages, an agreement was made between them by which B was to pay to A regular wages while he was disabled, and also to furnish him certain supplies. Subsequently this agreement was modified by a stipulation that B should give A such work as he could do, should pay him therefor wages of $60 per month, and later the parties entered into another contract, by which, after reciting A's claim for damages and the previous agreements, it was agreed that, in lieu of the above propositions, A's "wages from this date are to be $65 a month," A agreeing, on his part, to release B from all claims he might have against B. In an action by A against B on this contract, held, that this was not a hiring from month to month, terminable at the pleasure of either party, but was a contract to pay A $65 so long as his disability existed, he being bound to do such work as he could: *Pierce* v. *Tennessee Coal, Iron & Railroad Co.*, 19 Sup. Ct. 335.

CRIMINAL LAW.

Former Jeopardy, Rape

The question of former jeopardy was before the Supreme Court of South Dakota, in *State* v. *Adams*, 78 N. W. 353. The defendant was convicted of rape on a female under the age of sixteen years, and his application for a new trial was refused; but, inasmuch as the evidence showed that the female was over sixteen years of age at the time the offence was alleged to have been committed, the court, on its own motion, arrested the judgment and ordered the defendant to be held in custody for ten days, during which a second information was filed against him charging the same offence, with the exception that the date of the commission of the offence was earlier (in order to make its commission within the sixteen years). Held, that a plea of former jeopardy should be sustained.

DECEDENTS' ESTATES.

Right to Administer

Padelford's Estate, 42 Atl. (Pa) 287, settles a point in Pennsylvania practice. The residuary legatee, though disqualified to act as administrator by non-residence, was, nevertheless, held entitled to nominate an administrator.

EVIDENCE.

Competency of Physicians to Testify Under Wisconsin Statute

The case of *Bruendl's Will* (S. C. Wisconsin), 78 N. W. 169, contains an interesting decision upon the interpretation of a statute regulating the admission of testimony of attending physicians. The statute provided that no physician should disclose information, acquired professionally while attending a patient, which was "necessary" to enable him "to prescribe for such patient as physician." The court held that the statute, while it should be construed liberally, still, being in derogation of the common law, should not be enlarged further than the legislative intent required. It applied to all information given by a patient bearing on his condition which would aid the physician to fully comprehend it, so that he might "prescribe for it"—in the most liberal sense of the term, not merely that he might prescribe medicines, but might take any steps or direct any course of conduct or *regime* looking to the improvement of the patient's health, mental or physical. But the statute did not apply to exclude evidence of a physician's examination, when made not for the purpose of applying remedial measures, but only to ascertain the patient's condition for some other purpose—as here—to discover if her mental condition was such as to render it advisable that she resume control of her property.

FRAUDULENT CONVEYANCES.

Right of Administrator to Sue

In Michigan the legislature has remedied a defect in the common law by enacting that an administrator may pursue for the benefit of creditors property which has been conveyed to defraud them. In *Beith* v. *Porter*, 78 N. W. (Mich.) 336, the statute was liberally construed so as to apply to a case where the decedent had never had title himself, having taken title in his wife's name.

GUARDIAN AND WARD.

Guardians, Appointment of

X v. *Y*, [1899] 1 Ch. 526, is an important case. A man died, having by his will appointed his widow and his father testamentary guardians of his son, with survivorship. The father died; the widow married a Roman Catholic (the other parties in interest all being Protestants), and the child's grandmother now applies to court, under Act of 1886, for appointment of another guardian to act with the mother. Admitting their power in the premises, the court, nevertheless, refused to act, holding that their power was only to be exercised for the benefit of the

GUARDIAN AND WARD (Continued).

child, and there was nothing to show that the child needed any additional guardian.

HUSBAND AND WIFE.

A married woman's status has not been and should not be changed so far as to permit her to sue her husband on ordinary contracts. The importance of Pennsylvania Act, 1893, P. L. 345, § 3, forbidding such suits, is illustrated in *Hann* v. *Trainer*, 42 Atl. (Pa.) 367, where an affidavit was held sufficient, which set forth that the plaintiff sued as assignee of the wife only to escape the operation of this statute.

Suit by Wife Against Husband

New Jersey has recently (*Atlantic City Co.* v. *Goodin*, 42 Atl. 333), renewed allegiance to the doctrine that, in the absence of statutory prohibitions, common law marriage by *verba de præsenti* are still valid, and this in spite of cases like *Voorhees* v. *Voorhees*, 46 N. J. Eq. 411, holding that cohabitation and reputation will not justify a presumption of marriage, where the relation started by one of the parties, himself married, tricking the other into the performance of a marriage ceremony.

Common Law Marriage

A safe rule was adopted with respect to foreign divorces in *Magowan* v. *Magowan*, 42 Atl. (N. J.) 330, where the court decided that, admitting the divorce decrees of another state to be entitled to as much respect as any other judgments, yet it was still eligible for the injured party to show that the decree had been obtained by imposing false jurisdictional facts upon the foreign court.

Foreign Divorce, Validity

INFANCY.

Hilton v. *Shepherd*, 42 Atl. (Me.) 387, involved the question what act on the part of an infant amounted to a ratification of his voidable contract, and it was easily held that his sale of the horses purchased by him after coming of age was such ratification as prevented him from recovering the consideration paid by him.

Infant's Contract, Ratification

LIBEL AND SLANDER.

In a suit for slander after the plaintiff's witnesses had testified to the speaking of the words charged in the petition, without saying anything as to the language in which the words were spoken, the defendant introduced some evidence to the effect that the Irish language was used. The court below in instructing the jury said: "The words charged are

Slander, Presumption that the Words were Spoken in English

LIBEL AND SLANDER (Continued).

charged to have been spoken in the English language. So that, to entitle the plaintiff to recover in this action, it must appear that these words were spoken in the English tongue. If spoken in a foreign tongue, there can be no recovery in the petition in this case, for it is not claimed they were spoken in a foreign language, and no translation is given." . . . "The presumption, I think, is that they were spoken in the English tongue, and in the absence of proof to the contrary, the jury would be justified in assuming, then, the words were spoken in the English tongue, if spoken at all." Held, by the Supreme Court of Ohio, that this was not error. "This," said Burket, J., "is an English-speaking nation, and our courts and schools use that language, and the natural presumption is that English was used until the contrary is made to appear." *Heeney* v. *Kilbane*, 32 N. E. 262.

MASTER AND SERVANT.

In England the legislature has intervened to relieve the employe from the common-law rules. *Lowe* v. *Pearson*, [1899] 1 Q. B. 261, shows, however, the disposition of the courts still to protect the employer. It was there held that the Workmen's Compensation Act of 1897 did not apply to the case of a boy injured by machinery which it was no part of his duty to touch.

Employers' Liability

MORTGAGES.

A mortgage may be reformed to correspond in material details with the note for which it is security; nor is there any duty imposed upon the mortgagee to examine the papers, such as will deprive him of his right to reformation, if he fails to examine: *Tarke* v. *Bingham*, 55 Pac. (Cal.) 759.

Reformation

The difficulties that surround the unwholesome practice of conveying property absolutely when the transaction is really intended as a loan are illustrated in the case of *Bourgeois* v. *Gapen*, 78 N. W. (Neb.) 639. Upon bill filed to redeem, though the mortgagee had tried to take advantage of his nominal title, it was, nevertheless, held that the mortgagor should be charged with all disbursements necessary to carry out the original understanding of the parties.

Bill to Redeem

MORTGAGES (Continued).

Rights of Assignee, Discharge

It is well settled that a holder of an assignment of a mortgage as collateral security is entitled to receive payment of it and give a valid discharge; particularly can there be no doubt when the assignment contains an express authority. Hence, in *Lowry* v. *Bennett*, 77 N. W. (Mich.) 935, it was held that a discharge by the assignee by mistake bound the mortgagee as against an innocent purchaser who relied on the discharge.

MUNICIPAL CORPORATIONS.

Railroads, Municipal Aid

A police jury, having ordered an election whereat was submitted the question of the levy of a special tax in aid of a railway, to be constructed through the parish, and having compiled the returns and declared that the tax had been voted for by a majority of the qualified voters, and having formally adopted an ordinance levying the tax, is without legal capacity to pass another ordinance repealing the former one and annulling the tax, the railway having in the meantime been built: *Missouri K. & T. Trust Co.* v. *Smart* (Supreme Court of Louisiana), 25 So. 443.

Contracts, Estoppel

A statute of Michigan provides that when the council of a city shall, by resolution, declare that it is expedient to have waterworks constructed, and that it is inexpedient for the municipality to build such works, a water company may be organized. In an action on a contract to recover for water furnished to the city, it appeared that the contract recited the adoption of the resolution provided for in the statute; that the contract had been approved by the council; that the parties had acted under it for sixteen years, and that the company had expended large sums on the faith of it. Held, that the city was estopped to deny its power to enter into the contract on the ground that no resolution was, in fact, passed: *Luddington Water Supply Co.* v. *City of Luddington* (Supreme Court of Michigan), 78 N. W. 558.

Power to Contract

The Supreme Court of Michigan, following a well-established rule of the law of municipal corporations, has decided, in *Black* v. *Common Council of Detroit*, 78 W. W. 660, that a city has no implied or incidental power to enter into contracts requiring the expenditure of money for entertainments or celebrations, and that the city is not liable even to a *bona fide* contractor who furnishes goods for such entertainment.

NEGLIGENCE.

Street Cars, Master's Duty to Instruct Conductor

In *Fletcher* v. *Phila. Traction Co.*, 42 Atl. 527, the Supreme Court of Pennsylvania held that a street car company is not bound to instruct a conductor of nine years' experience, when taking out, for the first time, an open summer car, with a running board on the side, whereby it was extended nearer cars on the other track, of the danger of being struck by such while on such board.

The deceased had been a conductor for nine years, but had always operated a closed car. He was given on this occasion an open car, and shortly after starting on the trip, a violent thunderstorm arose and he went along the running board to pull down the curtains at the sides. Just at that moment a closed car passed, a crash was heard, and he was found dead on the roadbed. The marks upon his body indicated that he had been struck by the passing car. The negligence alleged was in not notifying the deceased of the danger incident to the passage of an open and closed car on tracks only 37½ inches apart. The Supreme Court held that the company was not bound to notify the conductor of the above danger. The danger was as obvious to him as to any one else, and he was neither young nor inexperienced, and, therefore, no recovery would be allowed.

Independent Contractors

It is now becoming well understood that an employer may be liable for the work of an independent contractor, to wit, in those cases where he has ordered the doing of a thing which, when done, is an interference with the rights of others. In *Holliday* v. *National Telephone Co.*, [1899] 1 Q. B. 221, it was held, however, that this does not apply to a company which has employed an independent contractor to connect the tubes in which its wires were threaded. The negligence of a servant of the contractor in using a defective lamp about the work was purely collateral to the undertaking and for it the company was not responsible.

OBITER DICTUM.

"Obiter" and "Judicial" Dicta

In *Brown* v. *Chicago & N. W. Ry. Co.*, the Supreme Court of Wisconsin finds it necessary to distinguish between what is "decided in a case" and what is mere obiter dicta. "It is a mistaken opinion," says the court, "that nothing is decided in a case except the result arrived at. All the propositions assumed by the court to be within the case, and all the questions presented and consid-

OBITER DICTUM (Continued).

ered and deliberately decided by the court leading up to the final conclusion reached, are as effectually passed upon as the ultimate questions solved. Nothing is obiter, strictly so called, except matters not within the questions presented—mere statements or observations by the judge who is writing the opinion—the result of turning aside, for the time, to some collateral matter by way of illustration." The court then quotes, with approval, what is said by Bouvier: "It is difficult to see why, in a philosophical point of view, the opinion of the court is not as persuasive on all the points which were so involved in the cause that it was the duty of counsel to argue them, and which were deliberately passed over by the court, as if the decision had hung upon but one point. Such dictum, if dictum it is, should be regarded as 'judicial dictum,' in contradistinction to mere obiter dictum:" 78 N. W. 771.

PARENT AND CHILD.

Apprenticeship

Statutes regulating contracts of apprenticeship usually provide that they must be signed by the minor. In *Anderson* v. *Young*, 32 S. E. (S. C.) 448, it was held that such a contract, though not signed by the minor and therefore voidable by him, was nevertheless binding on the parent, who had executed it; and if the contract appeared to be carried out so as to benefit the infant, the parent could not, by reason of the child's failure to sign, regain the custody of the child.

PLEADING AND PRACTICE.

Replevin, Under Statute of Wisconsin, Will Not Lie for a Dead Body

The Supreme Court of Wisconsin has recently decided that under the statute of that state providing for replevin, which requires an affidavit by the plaintiff setting forth that "his personal goods and chattels" have been unlawfully taken or are unlawfully retained, and for judgment for defendant when plaintiff fails in his case for a return of the property or its value, replevin will not lie to recover the body of plaintiff's brother in the hands of an undertaker, to whom it had been delivered by the authorities of a hospital. The court refers to the English cases that there can be no property in a human body, and to the American cases which maintain a *quasi*-property, and also to cases in equity of the prevention of interference with the control of the dead body by persons not entitled; but the decision is based upon the statute above cited: *Keyes* v. *Kunkel*, 79 N. W. 649.

PLEADING AND PRACTICE (Continued).

Excessive and Irrelevant Testimony Cause for Reduction of Costs in Equity of Successful Party

The United States Circuit Court for the Northern District of New York, in a suit in equity for alleged infringement of a patent, after examining the record, concluded that a successful defendant who had overloaded the record with a large amount of matter, mainly by the testimony of "too many experts and they talk too much," the testimony abounding "in repetition and irksome and prolix disquisitions," should be denied costs in the proportion which such testimony bore to the whole amount of evidence in the record: *Edison Co.* v. *E. G. Bernard Co.*, 91 Fed. 694.

Arguments of Counsel to Jury, Control of Court Over

Those who have been actively engaged in the trial of cases will appreciate the following right of control, by a trial judge, of the arguments of counsel to juries, asserted by the Supreme Court of New Jersey. It sometimes has been the course of counsel, of successful persuasive powers, in making the first speech for the plaintiff, to restrict himself to a brief outline and reserve his strength and eloquence for the reply. To avoid the influence of the "last word," counsel for defence have often waived the right to speak, preferring to keep silent rather than give the opponent the benefit of his prepared and forceful address. The ruling (March, 1899) was to this effect: When, in the summing up to the jury, the defendant's counsel refuses to reply to the opening argument on behalf of the plaintiff on account of its meagre and unsubstantial character—although the customary practice is not to allow the plaintiff to make a second argument—it is within the discretion of the court to permit the making of a second argument by the plaintiff; "or, to state it more accurately, to make a fuller and more complete opening." If such permission is granted, the defendant has a right to be heard in reply to such further address; and, if he exercise that right, the plaintiff is then entitled to make the closing argument: *New York & L. B. R. R. Co.* v. *Garrity*, 42 Atl. 842.

Federal Court Order Denying Leave to Intervene Not Appealable

A recent ruling of the United States Court of Appeals, Eighth Circuit, seems clear from the nature of the subject and well supported by authority. It is to the effect that, when leave to intervene in an equity case is asked and refused, the order made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the inter-

PLEADING AND PRACTICE (Continued).

vention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. An appeal cannot lie from such orders. They lack finality. "It is usually said of them that they cannot be reviewed, because they merely involve an exercise of the discretionary power of the trial court. In cases, however, where a denial of the right of a third party to intervene would be a practical denial of a certain relief, to which the intervener is fairly entitled and can only obtain by an intervention, the order of denial is not discretionary, and will generally furnish the basis of an appeal:" *Credits Co.* v. *United States*, 91 Fed. 570.

PRINCIPAL AND AGENT.

Hall v. *Murdock*, 78 N. W. (Mich.) 329, is a recent example of the familiar principle that an agent's admissions do not bind his principal, unless within the scope of his employment; hence an agent's admission that an elevator cable is defective is not evidence in a suit for damages for an injury caused by the breaking of the cable.

Admissions of Agent

It has long been well settled that parol evidence is admissible to prove that the nominal party to a written contract is only an agent, for the purpose of conferring either benefits or liability upon the real principal (though not, of course, for the purpose of exempting the nominal agent from liability): Accord, *Smith* v. *Felter*, 42 Atl. (N. J.) 1053.

Proof of Agency

PROPERTY.

The question of proprietorship in corpses is an interesting one. *O'Donnell* v. *Slack*, 55 Pac. (Cal.) 759, throws some light upon it. It was there held that, as the decedent had not asserted his own right to determine where he should be buried, that belonged to his next of kin—here his wife—and she could determine it without respect to the wishes of the executor, although the expenses should, of course, be paid by the latter.

Dead Bodies, Right of Burial

REAL PROPERTY.

In *Mattes* v. *Frankel*, 32 N. E. 585 (New York), a vendor took the vendee over the property before the sale and pointed out to him a way to a barn, which was part of the property. This way had been used for thirty years. The deed did not mention the way. After the conveyance the vendor brought an action for a trespass by the vendee in the

Right of Way

REAL PROPERTY (Continued).

use of this way. By a divided court it was held that the way passed as appurtenant to the property, and that the vendor was estopped to deny the vendee's right to its use.

RECEIVERS.

Following *Thomas* v. *Car Co.*, 149 U. S. 95, it was held in *Grand Trunk Ry. Co.* v. *Central Vermont Co.*, 91 Fed. 569, that the creditors whose claims were preferred in the order appointing a receiver were not entitled to interest on their claims, the delay being due to a stay by the court, and therefore not furnishing any foundation for damages.

Interest on Preferred Claims

SALES.

A, having sold goods to B, rescinded the sale on discovering that B was insolvent, and instituted an action of replevin to recover said goods. Held, that A need not, as a condition precedent to rescission, have returned to B drafts drawn on B for the price of the goods and accepted by him, such drafts being worthless and still in A's possession: *Skinner* v. *Michigan Hoop Co.* (Supreme Court of Michigan), 78 N. W. 547.

Rescission, Return of Consideration

A, knowing of the existence of phosphate beds on land of B, of which B was ignorant, procured a conveyance from B on the faith of representations that the land was valuable only for the timber that was on it, and that A wanted the land to add to land of his own to complete a body of timbered land to sell as such. B lived in Connecticut and A near the land in question. On bill to set aside the conveyance, held, that though A was not bound to disclose any facts affecting the value of the land, yet having undertaken to do so, he must disclose the whole truth. Cancellation decreed: *Stackpole* v. *Hancock* (Supreme Court of Florida), 24 So. 914.

Fraud, Expressions as to Value by Vendee

In *Maxwell* v. *State*, 25 So. 235, the Supreme Court of Alabama decides that a person receiving apples to be distilled into brandy on shares does not, by delivering to the owner of the apples his portion of the product, violate a law which prohibits the sale, gift or other disposition of intoxicants.

Intoxicating Liquors, Sale, Gift or Disposition

SURETYSHIP.

Some nice deductions from elementary law are seen in *Hallock* v. *Yankey*, 78 N. W. (Wis.) 156, holding (1) that a surety for a corporation cannot claim to be discharged by the extension of time given the corporation, when he, as officer of the corporation, had himself obtained the extension, and (2) that when one co-surety is discharged, the other co-surety is discharged to the extent of one-half of his debt, being the additional damage which he would otherwise suffer by the discharge of the first co-surety.

Surety, Discharge of

Greenwood v. *Francis*, [1899] 1 Q. B. 313, just touches on a nice point of law, viz., whether an agreement by a surety to give time to the principal discharges a co-surety; but the case turned on another point, as the mortgage which had been assigned by the creditor to the plaintiff surety expressly provided that no extension by the creditor should affect his rights against the sureties.

Agreement for Time

TELEGRAPH COMPANIES.

In Western Union Telegraph Co. v. *Chamblee*, 25 So. 232, the Supreme Court of Alabama decides that a contract with a telegraph company releasing the company from damages for mistakes in transmitting messages, unless the sender requires the message to be repeated, is invalid as being "induced by a species of moral duress."

Contract to Repeat Message, Duty of Sender

The court also holds that the sender of a telegram owes no duty to the telegraph company to inquire whether his message was correctly transmitted and received, and in an action against the company for negligence in transmission, contributory negligence cannot be imputed to him for not so inquiring.